INDEX.

	Page
Preliminary Statement	1
Opinion Below	2
Jurisdiction	2
Statute Involved	3
Questions Presented	3
Statement of the Case	5
The Questions are Substantial	10
Appendices—See Accompanying Document	
Footnotes to Appendices A and B—See Accompanying Document	

Table of Citations
Cases Cited:

Page

Connor v. Johnson, Civil No. 3830, S.D.Miss., Sept. 28, 1966 aff'd. 386 U.S. 483 (1967) 4, 16

Connor v. Johnson, Civil No. 2830, S.D.Miss., September 28, 1966 11

Dinis v. Volpe, Civil Action No. 66-767-G 11

Dinis v. Volpe, 264 F.Supp. 425 (1967) 28, 29

Gong v. Kirk S.D. Florida, Civil No. 64-143-CIV-EC 29

Kilgarlin v. Hill, 386 U.S. 120 (1967) 4, 13

Kirk v. Gong, Docket No. 872, January 15, 1968 29

Kirkpatrick v. Preisler, 385 U.S. 450 ..... 2, 4, 6, 13

Preisler v. Secretary of State of Missouri, W.D.Mo. 1965, 238 F.Supp. 187 2

Preisler v. Secretary of State of Missouri, W.D.Mo. 1966, 257 F.Supp. 953 ..... 2, 4, 6, 13

Preisler, et al. v. Secretary of State of Missouri, et al., 238 F.Supp. 187 6

Preisler, et al. v. The Secretary of State of Missouri, et al., 257 F.Supp. 952 6

Preisler v. Secretary of State of Missouri, 257 F.Supp. 952 10

Reynolds v. Sims, 377 U.S. 533 (1964) 3, 13

Sincock v. Duffy, 215 F.Supp. 169, 194 21

Swann v. Adams, 385 U.S. 440 (1967) 4, 13

Swann v. Adams, 35 U.S.L. Week 4101, 4103 (January 10, 1967) 18

Wesberry v. Sanders, 374 U.S. 802 3

Wesberry v. Sanders, 376 U.S. 1 (1964) 3, 6, 10

Statutes Cited:

	Page
Article I, Section 2, U.S. Constitution	3, 5, 6, 10, 16, 17, 20, 28, 29
Section 2281, United States Code, Title 28	3
Section 2284, United States Code, Title 28	3
1967 Missouri Congressional Redistricting Act	3, 4, 5, 10, 16, 17, 26, 28, 29
Sections 128.203 to 128.305, Missouri Revised Statutes, Cumulative Supplement 1967	3
House Substitute for Senate Committee Substitute for Senate Bill No. 182, 74th General Assembly of the State of Missouri	5
1961 Missouri Congressional Redistricting Act	6
1965 Congressional Redistricting Act	6
Article III, Section 45, Missouri Constitution	9

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

JAMES C. KIRKPATRICK, Secretary of State of Missouri, and NORMAN H. ANDERSON, Attorney General of Missouri,

Appellants,

vs.

PAUL W. PREISLER, LOUISE ERBE, BOSTIC J. FRANKLIN, LUCILE RIEDEL, DOROTHY CHILDS, SARAH RIFKIN, and MARTHA LEONARD,

Appellees.

On Appeal from the United States District Court For the Western District of Missouri Central Division.

JURISDICTIONAL STATEMENT.

PRELIMINARY STATEMENT.

This is an appeal from the opinion, judgment and decree of the United States District Court for the Western District of Missouri, Central Division, entered on December 29, 1967, decreeing that the 1967 Missouri Congressional Redistricting Act is unconstitutional and void. A three-judge court was convened to hear this cause and the judgment appealed from was concurred in by two members of the court, viz., the Honorable John W. Oliver, and the Honorable William R.

Collinson, Judges of the United States District Court for the Western District of Missouri. The third member of the court, the Honorable M. C. Matthes, Judge of the United States Circuit Court of Appeals for the Eighth Circuit, dissented from this judgment. This statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW.

The judgment of the court and the opinion appealed from are not yet reported. Appellants have filed, together with this jurisdictional statement, a separate document entitled Appendices to Jurisdictional Statement. The opinion, judgment and decree appealed from is set forth in said Appendices as Appendix A. The Findings of Fact and Conclusions of Law of the judgment appealed from are set forth in said Appendices as Appendix B. The dissenting opinion of the Honorable M. C. Matthes is set forth in said Appendices as Appendix C. The clarifying comments of the Honorable William R. Collinson are set forth in said Appendices as Appendix D.

The judgment and opinion appealed from are sequels to **Preisler v. Secretary of State of Missouri**, W.D.Mo. 1965, 238 F.Supp. 187, decided January 4, 1965, and **Preisler v. Secretary of State of Missouri**, W.D.Mo. 1966, 257 F.Supp. 953, decided August 5, 1966, affirmed sub nom. **Kirkpatrick v. Preisler**, 385 U.S. 450.

Upon the motion of appellants, the lower court entered its memorandum and order staying its judgment and decree pending final disposition of the appeal in this court which is set forth in said Appendices as Appendix E.

JURISDICTION.

This suit involves the constitutionality of a State statute

under Article I, Section 2, of the Constitution of the United States, and was required to be adjudicated by a three-judge court under Sections 2281 and 2284 of Title 28, United States Code. The judgment of the District Court, which was entered on December 29, 1967, declared the State statute to be unconstitutional, declared filings for the House of Representatives to the United States Congress pursuant to said statute to be null and void and prohibited appellants from accepting further filings under the statute. Notice of Appeal was filed in the lower court on January 12, 1968. The jurisdiction of the Supreme Court to review this decision by direct appeal in this case is sustained by **Wesberry v. Sanders**, 374 U.S. 802.

STATUTE INVOLVED.

The judgment and decree appealed from found that the 1967 Missouri Congressional Redistricting Act, Sections 128.203 to 128.305, inclusive, Missouri Revised Statutes, Cumulative Supplement 1967, pages 374 and 375, does not comply with Article I, Section 2, of the Constitution of the United States, and is therefore, unconstitutional and void. The 1967 Missouri Congressional Redistricting Act is set forth in Appendices to Jurisdictional Statement as Appendix F.

QUESTIONS PRESENTED.

1.

The opinion, decision and judgment appealed from erroneously construed **Wesberry v. Sanders**, 376 U.S. 1 (1964), by finding that congressional districts are not as equal in population as practicable if any other plan proposed to the Legislature or to the court can result in districts with smaller population variations.

2.

The opinion, decision and judgment appealed from is in conflict with **Wesberry v. Sanders**, supra, **Reynolds v. Sims**,

377 U.S. 533 (1964), **Swann v. Adams**, 385 U.S. 440 (1967), and **Preisler v. Secretary of State of Missouri**, 257 F.Supp. 953 (W.D.Mo. 1966), aff'd. sub nom. **Kirkpatrick v. Preisler**, 385 U.S. 450 (1967), by rejecting the principle that population variations between congressional districts which are de minimis are constitutionally permissible.

3.

The opinion, decision and judgment appealed from has misconstrued the burden of proof principles set forth in **Swann v. Adams**, supra, and **Kilgarlin v. Hill**, 386 U.S. 120 (1967), by holding that minor variations in the population of congressional districts are constitutionally impermissible in the absence of competent and substantial evidence justifying the variations.

4.

The opinion, decision and judgment appealed from erroneously rejected the authority of **Connor v. Johnson**, Civil No. 3830, S.D.Miss., Sept. 28, 1966, aff'd. 386 U.S. 483 (1967), which was relied upon by appellants in support of the constitutionality of the 1967 Missouri Congressional Redistricting Act.

5.

The opinion, decision and judgment appealed from is erroneous and in conflict with **Reynolds v. Sims**, supra, **Swann v. Adams**, supra, and **Kilgarlin v. Hill**, supra, in holding that in establishing congressional districts no allowance can be made for legislative interplay and that any population deviations from absolute mathematical equality between congressional districts attributable to political compromise within the state Legislature is arbitrary and discriminatory and invalidates such Legislation. The opinion renders nugatory considerations other than population which may be recognized by the Legislature in drawing congressional districts

as provided by **Reynolds v. Sims**, supra, **Swann v. Adams**, supra, and **Kilgarlin v. Hill**, supra.

6.

The opinion, decision and judgment appealed from erroneously finds that there is an overvaluation and overweight of votes in the rural geographic areas as contrasted with the votes in metropolitan areas in the composition of the congressional districts. This conclusion and others are based, to some extent, on inaccuracies in the Findings of Fact.

7.

The opinion, decision and judgment appealed from erroneously found that the 1967 Missouri Congressional Redistricting Act, House Substitute for Senate Committee Substitute for Senate Bill No. 182, 74th General Assembly of the State of Missouri, does not comply with Article I, Section 2, Constitution of the United States, and is unconstitutional and void. Population was the principal factor considered by the Legislature in enacting this law, and the minor variations in the populations of the resulting congressional districts fully comply with the constitutional requirement that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's. The 1967 Missouri Congressional Redistricting Act complies with Article I, Section 2, Constitution of the United States, is in harmony with all applicable constitutional principles and is valid.

STATEMENT OF THE CASE.

As a result of the United States Census of 1960, the number of members to which the State of Missouri was entitled in the House of Representatives in the United States Congress was reduced from 11 to 10. In 1961 the Legislature of the State of Missouri by law divided the state into ten congressional districts for the election of members to the House

of Representatives. Following this court's decision in **Wesberry v. Sanders**, 376 U.S. 1 (1964), the constitutionality of the 1961 Missouri Congressional Redistricting Act became the subject of a civil suit in the United States District Court for the Western District of Missouri. If districts which were absolutely equal in population were established, each district would contain one-tenth of the population of the state or 431,981.3 people. Under the 1961 Act the largest district had a population of 506,454 or a population of 74,473 in excess of a mathematically ideal district. The smallest district had a population of 378,499 or a population of 53,482 less than a mathematically ideal district. The largest district had a population of 127,955 in excess of the population of the smallest district. In a decision rendered on January 4, 1965, the court found that the 1961 Act did not meet the requirements of Article I, Section 2, of the Constitution and was void. **Preisler et al. v. Secretary of State of Missouri, et al.**, 238 F.Supp. 187.

In 1965 the Legislature of the State of Missouri enacted a new congressional redistricting law. Under the 1965 Congressional Redistricting Act the population of the largest district was 474,985 or 42,914 persons in excess of a mathematically ideal district. The population of the smallest district was 390,240 or 41,741 persons less than a mathematically ideal district. The largest district had a population of 84,655 in excess of the population of the smallest district. The constitutionality of the 1961 Act became the subject of a civil suit in the United States District Court for the Western District of Missouri in **Preisler, et al. v. The Secretary of State of Missouri, et al.**, 257 F.Supp. 952. The court found that the 1965 Act did not meet the requirements of Article I, Section 2, of the Constitution and was therefore void. Upon appeal to this court the judgment of the lower court was affirmed in **Kirkpatrick v. Preisler**, 385 U.S. 450.

In 1967 the 74th General Assembly of the State of Missouri once again engaged in the task of drawing ten congressional districts for the state. Sixteen different congressional redistricting plans were considered by the Legislature. The first Bill was introduced on January 18, 1967. After considering the many plans before it, legislative deliberation had resolved itself down to two plans, and a Bill was enacted on June 27, 1967. The final enactment came after a deadlock had been broken between the two Houses of the Legislature upon the submission of a substitute Bill by the Majority Leader of the House of Representatives.

The 1960 United States census population figures were the starting point for the General Assembly in its legislative deliberations concerning congressional redistricting. The 1960 census figures were adhered to constantly in the consideration of the many plans before the General Assembly up to and including the final enactment of the 1967 Act.

The accurate application of 1960 census figures to proposed districts in the metropolitan areas of Kansas City, St. Louis and St. Louis County involved a number of difficulties. Ward lines and precinct lines in the cities of Kansas City and St. Louis had been changed subsequent to the 1960 census. Annexations had been made to Kansas City subsequent to the 1960 census. Township lines and precinct lines had been changed in the County of St. Louis subsequent to the 1960 census. Entire new townships had been created in St. Louis County increasing the total number of townships and the total number of precincts. Relating 1960 census data to the new ward, township and precinct boundaries in these areas was a task to which the occurrence of some errors was almost inevitable. Population data for Kansas City was submitted by the local election officials admittedly as estimated data.

Supporters of the Bill which was finally enacted informed the members of the Legislature that the populations of the various districts were as follows: (Appellants have added to the tabulation the population variations from an ideal district of 431,981, together with the per cent of such variation)

Congressional District	Population	Variation from Ideal	Per Cent of Variation
1	436,417	+ 4,436	+1.06%
2	442,302	+10,321	+2.39%
3	431,507	— 474	—0.11%
4	423,815	— 8,166	—1.89%
5	430,412	— 1,569	—0.36%
6	425,238	— 6,743	—1.56%
7	436,769	+ 4,788	+1.10%
8	439,984	+ 8,003	+1.85%
9	428,223	— 3,758	—0.87%
10	423,866	— 8,115	—1.88%

According to these population figures the largest district (No. 2) has a population of 18,487 in excess of the smallest district (No. 4), with a resulting ratio of largest district to smallest district of 1.04.

After the commencement of this litigation, it was discovered that population totals for the districts were inaccurately calculated by the sponsors of the compromise Bill. Correct population figures were obtained from the Bureau of Census with the agreement of all parties to the case. The correct population figures for these congressional districts, the variation is set out below.

Congressional District	Population	Variation from Ideal	Per Cent of Variation
1	439,746	+ 7,765	+1.79%
2	436,448	+ 4,467	+1.03%
3	436,099	+ 4,118	+0.95%
4	419,721	—12,260	—2.83%
5	431,178	— 803	—0.18%
6	422,238	— 9,743	—2.25%
7	436,769	+ 4,788	+1.10%
8	445,523	+13,542	+3.13%
9	428,223	— 3,758	—0.86%
10	423,868	— 8,113	—1.87%

The largest district (No. 8) has a population of 25,802 in excess of the smallest district (No. 4) with a resulting ratio of largest district to smallest district of 1.06.

Thus, although the 1960 U.S. Census figures were the data which was employed in the consideration of congressional redistricting legislation by the Missouri Legislature, inaccurate calculations caused the Legislature to believe that the populations of the congressional districts in the enacted Bill varied from an ideal district by a lesser number of people than is actually reflected by correct calculations based upon the 1960 census.

The uncontradicted testimony before the court by the legislative leaders from both parties for both Houses was that the legislative deliberations in considering congressional redistricting during the 1967 session had been based upon population.

This testimony also reflected that the Legislature had given consideration to maintaining the integrity of counties throughout the state with the exception of Jackson County, which has a population over 60,000, and with the exception of St. Louis County, which contains over 700,000 people. Consideration was also given to the creation of districts which were compact and contiguous in area as is required by the Missouri Constitution, Article III, Section 45. Further consideration was given to the historical and traditional make-up of congressional districts. In the creation of two of the smallest districts (No. 4 and No. 6) consideration was given to the factor that areas in these districts were growing rapidly in population. In the creation of the largest district (No. 8) consideration was given to a large number of transitory, nonresident and nonvoting people located within the boundaries of the district (Fort Leonard Wood, a large U.S. Military Reservation, the University of Missouri at Columbia and Rolla, and the State Capitol at Jefferson City).

In **Preisler v. Secretary of State**, 257 F.Supp. 952, the court retained jurisdiction for the purpose of the court's future consideration of the constitutionality of any subsequent legislation relating to congressional redistricting that might in the future become the law of Missouri. Upon the 1967 Congressional Redistricting Act becoming law, appellants filed a motion with the court seeking approval of the 1967 Act and seeking termination of the proceedings. After hearings held on the motion and after consideration of briefs filed, the court, by a two to one decision, held that the 1967 Act does not comply with the requirements of Article I, Section 2, Constitution of the United States, and is void. This appeal is taken from that decision.

THE QUESTIONS ARE SUBSTANTIAL.

1.

The majority opinion of the court in the case on appeal finds that the population requirements of Article I, Section 2, of the Constitution have not been met in a congressional redistricting plan if the population variations between the districts are "* * * greater than those that would have been created by better plans in fact presented to but rejected by a legislature or those created by similar plans that may be presented to a court in the trial of an apportionment case. * * *" Appellants contend that the stringent requirements of such a rule are far in excess of the constitutional requirements as construed by this court in **Wesberry v. Sanders**, 376 U.S. 1 (1964). Furthermore, this rule of the lower court is in conflict with the opinions of United States District Courts in other jurisdictions which have been affirmed by this court.

The rule of **Wesberry v. Sanders** is "* * * that as nearly as is practicable, one man's vote in a congressional election is to be worth as much as another's. * * *" The court held that the lines of congressional districts may not be drawn

in such a way as to give some voters a greater voice in choosing a Congressman than others. The court recognized that it may not be possible to draw congressional districts with mathematical precision.

In **Connor v. Johnson**, Civil No. 2830, S.D.Miss., September 28, 1966, not reported, a Congressional Redistricting Act in the State of Mississippi, which created districts with population variations slightly in excess of the population variations in the 1967 Missouri Act, was upheld by the District Court. Upon appeal to this court it was contended, among other things, that this congressional redistricting plan did not conform to constitutional standards of population equality when compared to available alternatives. It was pointed out that a plan had been proposed to the Legislature and to the court in which the population variations were cut in half as compared to the plan adopted without dividing county lines. The lower court was affirmed by this court without opinion on March 27, 1967, in Docket No. 999, 386 U.S. 483.

In **Dinis v. Volpe**, Civil Action No. 66-767-G (not reported), District of Massachusetts, October 3, 1967, the court found that a Congressional Redistricting Act in the State of Massachusetts complied with the requirements of Article I, Section 2, of the Constitution. The court noted that a minority report presented a plan to the legislature which would have reduced the population variations in the districts by almost one-half. Upon appeal to this court the decision of the lower court was affirmed on January 15, 1968, Docket No. 882.

This court has never held that a congressional redistricting act is invalid if other plans which more closely approximate population equality have been presented to the legislature or to the court. The cited cases approved legislative acts under circumstances wherein other plans more closely

approximating population equality had been presented to the legislature and the reviewing courts. These decisions have been affirmed by this court. Therefore, it appears that the opinion of the court on appeal is in conflict with prior decisions of other District Courts as affirmed by this court.

The practical complexities involved in the rule adopted by the lower court can lead to endless mischief. The legislative process of congressional redistricting requires the skillful compromise of a multitude of conflicting individual interests. When a legislature has reached the end of the rope in an apportionment tug-of-war and compromise approximating population equality is being finalized, the entire legislative deliberation can be thrown askew if a plan that is slightly better in the terms of population equality is presented as an eleventh-hour proposal. If a legislature adopted the best congressional redistricting plan in terms of population equality among the districts that had been proposed to it, the governor would be under obligation to veto the plan if a better plan in terms of population equality among the districts was proposed to him before such legislation became law by his signature. Even if no better plan in terms of population equality is suggested to the legislature, an adopted plan is subject to being voided in a subsequent court proceeding in which a slightly better plan may be proposed. Appellants find nothing in the prior decisions of this court or in the prior decisions of any other lower court which suggest that the validity of a congressional redistricting plan may be void if any mathematical improvement in the population of the districts can be demonstrated.

If this court should summarily affirm the opinion, judgment and decree of the lower court the principle adopted by the lower court to the effect that a congressional redistricting plan does not meet the population requirements of the Constitution if plans reflecting districts more equal in pop-

ulation have been proposed, either to the legislature or the court, would become the law of the land. The tremendous impact throughout the several states in the area of congressional redistricting which is inherent in the principle adopted by the lower court indicates the urgent necessity for plenary consideration by this court on review.

2.

The majority opinion of the court in the case on appeal rejects the principle that population variations between congressional districts which are de minimis are constitutionally permissible and the court further finds that minor variations in the population of congressional districts are constitutionally impermissible in the absence of competent and substantial evidence justifying the variations. These stringent principles adopted by the court are in excess of any prior lower court decision or any prior decision of this court. The excessiveness of these principles adopted by the lower court is in conflict, either expressly or impliedly, with **Wesberry v. Sanders**, supra; **Reynolds v. Sims**, 377 U.S. 533 (1964); **Swann v. Adams**, 385 U.S. 440 (1967); **Kilgarlin v. Hill**, 386 U.S. 120 (1967); **Preisler v. Secretary of State of Missouri**, 257 F.Supp. 953, (W.D.Mo. 1966) aff'd. sub nom. **Kirkpatrick v. Preisler**, 385 U.S. 450 (1967; **Connor v. Johnson**, supra; **Dinis v. Volpe**, supra; and a multitude of District Court decisions from jurisdictions all over the United States constituting most if not all of the congressional redistricting cases decided since the decision in this court's landmark case, **Wesberry v. Sanders**.

The ultimate goal in congressional districts is to enable the people of the United States to have an equal voice in choosing the members of the House of Representatives in the United States Congress. A member of Congress is the representative of people and the whole theory of representa-

tive government becomes a mockery if the votes of some people are diluted in favor of overvaluation of the votes of other people. Thus, the issue in any congressional redistricting becomes whether or not the vote of Mr. X has been diluted in a fashion that is repugnant to the fundamental principles of representative government.

Wesberry v. Sanders recognizes that it may not be possible to draw congressional districts with mathematical precision. **Reynolds v. Sims** teaches that mathematical nicety is not a constitutional requisite and that mathematical exactness or precision is hardly a workable constitutional requirement. **Swann v. Adams** declares that de minimis deviations are unavoidable. **Preisler v. Secretary of State** (authored by the same judicial writer who prepared the opinion in the case at Bar) recognizes that the doctrine of de minimis is applicable to population variations between congressional districts (257 F.Supp. l.c. 973). **Kilgarlin v. Hill** rejects the constitutional validity of population variances of the size and significance before the court in that case (14.84% in excess and 11.64% below a mathematically ideal district). **Dinis v. Volpe** finds that the deviations from mathematical perfection in the Massachusetts Congressional Redistricting Act are obviously de minimis. **Connor v. Johnson,** gives implicit recognition to the doctrine of de minimis by finding that the population variations of congressional districts in the Act reviewed by the court (variations in excess of those found in the Missouri Act) reflect districts substantially equal in population. All of the principles cited in this paragraph have been expressly declared by this court or declared by lower court decisions which have been affirmed by this court.

The fundamental principle of the system of representative government in this country requires that the goal in establishing congressional districts is to provide a near equal

voice to each individual in the election of representatives. This ultimate goal cannot be reached but the Constitution requires that the end result of efforts in pursuit of the goal be that one man's vote shall as nearly as is practicable be worth as much as another's. The failure of perfection in pursuit of this goal is evident from the assignment of the number of members of Congress to the several states. Under this complicated process the State of New Hampshire with two members of Congress assigned could elect Congressmen from mathematically ideal districts composed of 303,461 people. At the other end of the pole the State of Maine with two Congressmen assigned could elect members of Congress from mathematically ideal districts composed of 484,633 people. Mathematically ideal districts in the remainder of the states which elect more than one Congressman run the scale between these two extremes. (In passing, it is interesting to note that congressional districts in the State of Maine vary in population by 8.60% and congressional districts in the State of New Hampshire vary by 18.68%). Thus, the fundamental goal of one-man one-vote is impossible of achievement in electing members of Congress throughout the 50 states.

Appellants do not intend to suggest that the variations in hypothetically ideal districts among the several states from 303,461 to 484,633 should permit individual states to establish congressional districts with substantial and significant population variations. Appellants support wholeheartedly the one-man one-vote principle and its application to congressional redistricting plans as a necessary and desirable foundation block in our cherished system of representative government. However, appellants insist that common sense dictates, and the concept of practicable anticipates, a zone of reasonableness in the variation of populations among congressional districts which may be said to meet the require-

ments of Article I, Section 2, of the Constitution, without further explanation. Population variations within this zone of reasonableness are de minimis. The implications toward prolific and widespread litigation in this field for the remainder of the decennium and for the next are staggering should the standards exacted by the divided lower court receive the imprimatur of this court.

It is appellants' observation that most of the several states have faithfully adhered to the application of the one-man one-vote principle in establishing congressional districts subsequent to **Wesberry v. Sanders.** If the rejection of de minimis as a valid principle in determining population variations among congressional districts which are constitutionally permissible becomes the law of the land, practically every one of the several states must commence anew the task to establish valid congressional districts. Appellants earnestly contend that the variations in the 1967 Missouri Congressional Redistricting Act fall within this zone of reasonableness. The far reaching consequences of the opinion and decision of the lower court require plenary consideration by this court on review.

The opinion, decision and judgment appealed from erroneously rejected the authority of **Connor v. Johnson,** Civil No. 3830, S.D.Miss., September 28, 1966, aff'd. 386 U.S. 483 (1967), which was relied upon by appellants in support of the constitutionality of the 1967 Missouri Congressional Redistricting Act.

Appellants relied upon **Connor v. Johnson** as support for the constitutionality of the 1967 Missouri Congressional Redistricting Act. In **Connor v. Johnson** congressional districts which had been established by the Legislature in the State of Mississippi were before the court for a determination as to whether such districts complied with the requirements of

Article I, Section 2, Constitution of the United States. The population variations between the districts were somewhat in excess of the population variations in the 1967 Missouri Congressional Redistricting Act. In Missouri the average ideal district is 431,981, whereas, in Mississippi it is 435,628. In Missouri the largest district has a population of 445,523, this being 13,542 in excess of the ideal or 3.13% in excess. In Mississippi the largest district has a population of 449,565, this being 13,937 in excess of ideal or 3.19%. In Missouri the population of the smallest district is 419,721, this being 12,260 less than ideal or minus 2.83%. In Mississippi the population of the smallest district is 423,300, this being 12,328 below ideal or minus 2.83%. In Missouri the population difference between the largest district and the smallest district is 25,802 or a ratio of 1.06 to 1. In Mississippi the difference in the population between the largest district and the smallest district is 26,265 or a ratio of 1.06 to 1.

The lower court found that the Mississippi Congressional Redistricting Act met the population requirements of the Constitution and an appeal was taken to this court. This court affirmed the lower court without opinion.

The opinion of the lower court in the case at Bar rejected the authority of **Connor v. Johnson** claiming that the issue of population equality was not before this court. It is true that the principal issue raised by appellants before this court in **Connor v. Johnson** was that the Mississippi Act constituted a racial gerrymander among the congressional districts in violation of the Constitution. However, an examination of the Jurisdictional Statement filed by appellants in this court reflects that a failure to achieve population equality in the districts was inherent in the appeal to this court. Population inequality is referred to in the Statement of Facts on page 8 of the Jurisdictional Statement as follows:

"Nor does the legislature's adopted plan conform to standards of population equality when compared to the available alternatives. The difference between the largest and the smallest district under the plan adopted is 28,061; the same figure for the Revised Delta Plan is 13,672, less than half. The greatest deviation from the norm in the adopted plan is 15,332; in the Revised Delta Plan, it is 7,572. The average deviation of all five districts in the adopted plan is 11,547; in the Revised Delta Plan, it is 3,767. Clearly, the desire to achieve mathematical population equality was not decisive for the Mississippi legislature in its choice of plans."

The population inequality issue is further reflected in appellants' argument that the questions are substantial, pages 17 and 18 as follows:

"This Court and other courts have had occasion to discuss the considerations which a legislature may legitimately take into account in reviewing the propriety of districts which deviate from strict population norms. The 1966 congressional districting act of the Mississippi legislature appears on its face substantially to meet the test of numerical equality; the population deviations from the mean of approximately 435,000 do not exceed 3 per cent, which would normally not seem excessive. However, other plans (Appendices D and E, **infra**, pp. 41 and 42) were submitted which 'do demonstrate that a closer approximation to equally populated districts was a feasible undertaking,' **Swann v. Adams**, 35 U.S.L. Week 4101, 4103 (January 10, 1967); in these alternate plans the division of any county was also avoided, and at the same time they preserved the historical pattern of congressional districting in Mississippi much better, and conform more nearly to socio-economic-topographi-

cal patterns in the state. Most important of all, these alternate plans are altogether free of racial gerrymander.

"All the criteria of rational congressional districting could easily have been satisfied by the adoption of any one of several alternative plans. Indeed, it would not have been possible to devise a plan that satisfied all the legitimate criteria to any substantial extent without at the same time creating a congressional district with a substantial majority of Negroes of voting age, which was precisely what the Mississippi legislature was concerned to avoid. They therefore adopted a plan with less equal numerical districts; no explanation was offered for this by the state, and indeed none was available to it other than the frank acknowledgment of the importance of race."

and pages 20 and 21:

"In any event, it is submitted that adequate proof, both of purpose and effect, has been supplied. That something unusual occurred in the drawing of Mississippi's district lines in the present plan can be seen by a look at the First Congressional District in Appendix B, infra, p. 39: We have but to add hind legs and a tail to see a fattened version of Governor Gerry's original salamander. Drawing a line in an east-west direction all the way across the northern half of the state is directly contrary to the scheme of every congressional districting plan used by the state of Mississippi at least since 1894. Population reasons clearly do not demand it; much more equal districts are obtained by dividing all of the counties now in the First and Second Districts in a north-south direction instead of an east-west direction. (Appendix E, infra, p. 42; a north-south division further

would be consistent with all of the detailed evidence introduced as to Mississippi's history, topography, geography, economics, and traditions. Other plans, even more closely following historic precedents in Mississippi, were introduced by appellants in the District Court, and the difference in population between the largest and smallest district in appellants' Revised Delta Plan (Appendix D, **infra**, p. 41) is only 13,672 compared to a difference of 28,061 in the legislature's arbitrary and unusual plan. No evidence whatsoever was introduced by the state to justify the manner in which it acted."

There is absolutely no question but what the principal issue before the lower court in **Connor v. Johnson** was the population requirements of Article I, Section 2, Constitution of the United States. The unreported opinion is set forth in the Jurisdictional Statement filed in that case, pages 27 through 38. The issue as to population equality is discussed and disposed of by the court on pages 33 to 35.

Appellants view this court's summary affirmance of **Connor v. Johnson** to include the opinion and judgment of the lower court to the effect that the congressional districts meet the population requirements of the United States Constitution.

4.

The opinion, decision and judgment appealed from is so fraught with distortion, inaccuracy and irrelevancies that its decision should not stand. These inaccuracies arise continually throughout the opinion and throughout the Findings of Fact. Some of the conclusions are necessarily erroneous being based upon factual inaccuracies. It is difficult to classify or pinpoint these inaccuracies into groups for the purpose of overcoming erroneous conclusions. However, a discussion of certain of these inaccuracies follows for the

purpose of demonstrating the seriousness of such erroneous fact finding. If the court agrees to give plenary consideration to this matter a more complete treatment of the inaccuracies appearing throughout the opinion will be presented by appellants.

1. The opinion of the lower court made the following finding:

> "The evidence adduced at that hearing established that the 1967 General Assembly of Missouri at no time ever considered accurate 1960 census population figures in its consideration of the 1967 Act."

This finding of the court collides with the record which is replete with evidence that the Legislature based all of its considerations on populations obtained from the United States Bureau of the Census with but a single exception. This exception was the use of estimated population for the newly drawn Kansas City wards which the lower court admitted in its opinion were accurate. The court's erroneous finding that accurate population figures were never considered stems from slight miscalculations which apparently resulted from last minute amendments to the enacted Bill. It is difficult to attach any great significance to the miscalculations in view of the extremely small population variations in the enacted Bill. The lower court's obsession with the claimed inaccurate use of census data by the 1967 General Assembly of Missouri and its conclusion that one cannot "hit the bull's eye [one-man; one-vote] with a defectively sighted weapon" (**Sincock v. Duffy**, 215 F.Supp. 169, 194) amounts to dragging a red herring into the case. The significant question was whether or not the 1967 Missouri General Assembly, like William Tell, hit the apple, and it should matter very little whether such was done blindfolded or even through the use of mirrors!

The majority opinion of the lower court assails the competency of the author of Senate Bill 182 by concluding that he used inaccurate population data. Senator Omer Avery, the author of Senate Bill 182, testified as to the population for each of the districts in this Bill. The court makes its own calculations as to the populations of the districts in this Bill and the results of such calculations vary substantially from the calculations testified to by the author of the Bill. The population variations between the districts are far more drastic than the variations contemplated by the author of the Bill. **However, the judicial author of the lower court's opinion did not use the same boundaries for congressional districts as the boundaries used by the author of the Bill.** It has been noted in the statement of the case that there were difficulties inherent in the use of 1960 census data by reason of changes in the wards and precincts in the cities of St. Louis and Kansas City by reason of annexations to the City of Kansas City and by reason of changes in the townships and precincts in St. Louis County which increased the number of townships and precincts. These changes occurred subsequent to the 1960 census. Senator Avery in drafting Senate Bill 182, recognized these difficulties and therefore, described the boundary lines of the congressional districts in St. Louis and St. Louis County with reference to wards and townships as they existed in 1960. Therefore, he calculated the population of the congressional districts in the City of St. Louis and St. Louis County with reference to such boundaries. However, the writer of the majority opinion blandly admitted in a note to the table in which he had calculated the populations of the districts that he was using the boundaries of townships in St. Louis County as they existed in 1967. It is also apparent that the court used ward boundaries in the City of St. Louis which existed in 1967. **It is obvious that the court did not use the same boundaries for congres-**

sional districts which were used by Senator Avery in drafting his Bill. Therefore, the population discrepancies relied upon by the court have no foundation in fact. The court's shaping of the evidence to suit its own purpose should not be condoned.

2. The majority opinion of the lower court finds that "better plans were in fact presented to but rejected by (the 1967) Missouri legislators." This finding by the court is one of the principal foundation blocks upon which it bases its conclusion that the congressional districts in the enacted plan are not as nearly equal in population as practicable. This conclusion by the court is based upon fallacious findings of fact.

The court comments at length upon House Bill No. 870 as being a better plan than the enacted plan. In the words of the court this plan "* * * provided districts that vary substantially less from the ideal than any bill ever before proposed by any Missouri legislature. * * *" In reaching its conclusion the court calculated the population of the various districts proposed by House Bill No. 870. In doing so the court lumped the entire population of the area encompassed by proposed Districts 1, 2, 3, and 9 into one population total. This population total was divided by 4 and equal populations of 431,896 were assigned to these 4 districts. **These district populations bear no relationship what so ever to the populations actually present within these individual 4 districts.** A conclusion that House Bill No. 870 was a better plan from the one-man one-vote concept based upon such a factual premises is entirely fallacious.

Appellants have not calculated the populations of the 4 districts in question. Furthermore, it does not appear that the sponsors of the bill made any attempt to calculate the populations of these districts. The proposed bill utilized

1960 ward and precinct boundaries in the City of St. Louis and 1965 township and precinct boundaries in St. Louis County. Relating 1960 census data to the boundaries described in the proposed bill make it difficult, if not impossible, to compute the population totals of the districts. Any accurate computation of the population of these districts should be made by the experts at the Bureau of Census.

If it is valid to calculate the populations for congressional districts as done by the court for the 4 districts in question, it is equally valid to take the entire geographical area of the State of Missouri with its total population, divide by 10, place 10 abstract stars on a map of the State of Missouri and conclude that 10 perfect congressional districts have been established in so far as population is concerned. **Reductio ad Absurdum!**

3. Appellant's evidence in justification of the somewhat excess population allocated to the Eighth District (the most populated district) was rejected by the court without justification.

The lower court unjustifiably rejected out of hand the defendant's evidence (and not mere argument as the court would suggest) that the 1967 Missouri General Assembly took into consideration the great number of transitory and nonvoting citizens located in the 8th Congressional District of the 1967 Act (i.e., students at the State University, State employees at the State Capitol and members of the U. S. Army at Fort Leonard Wood) in allocating excess population to this district. Voting returns for Pulaski County, wherein Fort Leonard Wood is situated, demonstrate beyond cavil that this county of 46,000 population is but a county of approximately 10,000 from a voting standpoint. A comparison of Pulaski County with all of its adjoining counties in the matter of total vote in relation to the county's population in a recent election amply proves this point.

TOTAL VOTE TO POPULATION—PRESIDENTIAL ELECTION NOV. 1964

County	1960 Population	Total Votes	Percent of Votes
Phelps	25,396	9,531	37.5
Laclede	18,991	8,365	44.0
Texas	17,758	7,836	44.1
Miller	13,800	6,642	48.1
Camden	9,116	5,129	56.2
Maries	7,282	3,246	44.5
PULASKI	46,567	5,239	11.2

Source—Page 1176, Official Manual of Missouri; 1965-66; Pages 27-13, 14, US Census Population; 1960, Number of Inhabitants, Missouri, Final Report PC (1-27A).

The somewhat lower percentage of votes to population in Phelps County reflects the presence of Rolla School of Mines, a branch of the University of Missouri, with approximately 4,000 students.

4. Distortions of testimony by the majority opinion influenced erroneous conclusions.

In appraising the testimony of legislative leaders the court concluded that the standard followed by the Missouri Legislature was "* * * how much variance can we expect to get away with. * * *" In reaching this conclusion the court alluded to the testimony of Senator Avery, the author of Senate Bill 182. The court quotes his testimony to the effect that the "* * * Missouri legislature could comply with the 'as nearly as is practicable' standard of Wesberry v. Sanders by getting within 2% of the equality demanded by Article I, Section 2." When Senator Avery's testimony is viewed in its context, it becomes apparent that the witness, while recognizing that perfect population equality had not been achieved, considered variances of "a little over 2% under" and "approximately 2% over" for the two particular districts about which the witness was testifying to be not unreasonable in the light of other considerations. The other considerations to which the witness was referring were

compactness, as required by the state Constitution, and the integrity of county lines.

The court flatly distorted the testimony of another witness, the Majority Leader of the House of Representatives. The majority opinion described his testimony as an admission that the 1967 Missouri Congressional Redistricting Act could have been greatly improved to the "* * * extent of perhaps lowering the differences between the maximum or minimum by as much as 15,000. * * *" **No such testimony was given by the witness.** The record discloses that the quoted material referred to was included in a question by plaintiffs attorney during cross-examination. **The witness's response did not ratify the statement included in the question.**

The court makes a similar distortion of another witness's testimony by editing the testimony so as to make it appear that the witness believed the 1967 Missouri General Assembly had rejected "* * * a better bill, a stronger bill * * *" in terms of closer equality in population. This witness, the Minority Leader of the House of Representatives, made the statement referred to in quotes in regard to the political composition of the proposed districts in a Bill which had been rejected by the Legislature. It is quite clear that the witness considered the rejected Bill to be "* * * a better bill, a stronger bill * * *" insofar as his political party was concerned rather than insofar as population equality is concerned.

For the reasons indicated herein appellants urge the court in ruling upon the Jurisdictional Statement to read the relatively short testimony, including a deposition of 21 pages and the hearing testimony of 82 pages.

5. Appellants' table comparing maximum population deviations in congressional districts among the several states

was rejected from consideration erroneously by the lower court.

The court unfairly and unjustifiably rejected appellants' table comparing Missouri with other states in the matter of current congressional district statistics. The court apparently discarded these tables because the court believed that the expression of the total percentage deviation from the ideal should be expressed in some other manner than in the mere addition of the highest and lowest percentage figures. The court chose to disregard the only intended purpose of this particular mathematical device, that being only a means of conveniently arranging the various states in a logical sequence. For its intended purpose the method was not inaccurate, and for the court to conclude from this single factor that the entire table was inaccurate, and thus unworthy of any consideration, was improper. The court alluded to a similar table appearing in the Congressional Quarterly weekly report of September 16, 1966 (should be April 15, 1966) at page 814, and summarily dismissed the appellants' table by noting that it did not agree with any of the figures on the aforesaid Congressional Quarterly table. If the court would have closely examined the Congressional Quarterly table, it would have noted that such table did not attempt to list the total variation from highest district to lowest district, as did the appellants' table, but merely listed the "% Maximum Variations" in only a single direction from the ideal.

Appellants are baffled at the court's implication that none of the figures on the table agree with sources cited by appellants. The principal source of the table was the publication by the National Municipal League in August 1967, entitled Apportionment in the 1960's. The information was made current by the other sources cited. In spite of the con-

tempt expressed by the court, appellants firmly stand upon the accuracy of the table.

The court further condemns appellants' table of the several states for the reason that comparisons with other states is totally irrelevant to a determination of the constitutionality of the Act in question. This conclusion of the court conflicts with the opinion in **Dinis v. Volpe**, 264 F.Supp. 425 (1967) l.c. 429, wherein the court stated that deviations from the ideal quotient judicially disapproved in other cases do give some indication of the limits of constitutional departure from numerical equality.

Furthermore, appellants consider the table to be directly relevant to the issue of **de minimis** consistent with the opinion cited above. A comparison of how Missouri stands in relation to the several states in view of the multitude of congressional redistricting plans which have been adopted subsequent to **Wesberry v. Sanders** is relevant to the question of **de minimis.**

The 1967 Missouri Congressional Redistricting Act complies with the requirements of Article 1, Section 2 of the Constitution of the United States. Population was the principal factor considered by the legislature in enacting this law and the minor deviations in the populations of the Districts are well within the standards of de minimis. Therefore the judgment of the lower court in validating the 1967 act is erroneous.

Appellants have demonstrated to the court that the lower court rejected the doctrine that de minimis population variations in the congressional districts are constitutionally permissible per se. It is apparent that this conclusion of the lower court is erroneous and that the doctrine of de minimis applies to the 1967 Missouri Act.

Appellants have compared the Missouri Act with **Connor v. Johnson,** supra, in support of the argument that the population variations are de minimis. Congressional districts approved in the State of Mississippi are somewhat less in the degree of population equality achieved than the Missouri districts under review. Appellants recognize that what is constitutionally permissible in one state may not be constitutionally permissible in another state; **Swann v. Adams,** supra. However, if there is absolutely no difference whatsoever in the facts and circumstances concerning the Congressional Redistricting Act in two states, it must be concluded that population variations which are constitutionally permissible in one state are permissible in the other state. A reading of the decision in **Connor v. Johnson** reflects that the facts, the circumstances, and the considerations, which may be taken into account pursuant to Article I, Section 2, of the Constitution of the United States in establishing congressional districts were identical with the facts, the circumstances, and the considerations in establishing congressional districts in Missouri.

The comparison of congressional districts with the Congressional Districts in Mississippi is supported by **Dinis v. Volpe,** 264 F.Supp. 425 l.c. 429. Certainly consistency in the application of constitutional principles requires comparison if the facts, the circumstances and the considerations which may be taken into account in determining permissible population variations are identical.

The de minimis nature of the districts established by the 1967 Missouri Act is supported by **Gong v. Kirk S.D. Florida,** Civil No. 64-143-CIV-EC, affirmed sub nom. **Kirk v. Gong,** Docket No. 872, January 15, 1968. In the cited case congressional districts were drawn by the lower court. The intended population variation of the largest and smallest district was

1.94%. Following the decision in the case it was discovered that the court had been substantially inaccurate in calculating the population of the districts. The districts, in fact, varied in population by 11.83% between the smallest and largest district. The accurate population figures were calculated by the Bureau of the Census. Upon a motion to reconsider the accurate population data was brought to the attention of the court. The court refused to reconsider and an appeal was taken to this court. This court summarily affirmed on January 15, 1968.

The comparison with the factual situation in Missouri is obvious. In Missouri the legislature thought that they had created districts which varied by 4% between the smallest and largest district. Accurate figures furnished by the Bureau of Census during the course of litigation reflected that the variation was in fact 6%. Affirmance by this court of variations in Florida which were in fact 12% is supported for the de minimis nature of the variations in the Missouri districts which are in fact 6%.

It is respectfully submitted that substantial questions are presented on the merits of the case which merit plenary consideration by this court.

Respectfully submitted,

NORMAN H. ANDERSON
Attorney General

THOMAS J. DOWNEY
First Assistant Attorney General

LOUREN R. WOOD
Assistant Attorney General
Supreme Court Building
Jefferson City, Missouri
Attorneys for Appellants.